JD(ATL)—27—05
Muncie, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

WGE FEDERAL CREDIT UNION

and **Case 25–CA–29101**

LOCAL 1, OFFICE AND
PROFESSIONEL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Derek Johnson, ***Esq***.,
for the General Counsel.
Barbara Baird, Esq.,
for the Charging Party.
Kim F. Ebert, Esq.,
for the Respondent.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, **Administrative Law Judge**: This consolidated case was heard before me in Muncie, Indiana, on March 29, 2005, pursuant to a complaint issued by the Regional Director of Region 25 of the National Labor Relations Board ("the Board") on January 21, 2005. The complaint alleges that WGE Federal Credit Union ("the Respondent" or "the Credit Union") violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"). The complaint is based on charges filed by Local 1, Office and Professional Employees International Union, AFL-CIO ("the Charging Party" or "the Union"). The original charge in this proceeding was filed by the Union on March 23, 2004. The first amended charge was filed by the Union on May 12, 2005. The second amended charge was filed by the Union on June 30, 2004. The complaint is joined by the amended answer of the Respondent wherein it denies the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing and the positions of the parties as argued at the hearing and as set out in their briefs, I make the following:

Findings of Fact and Conclusions of Law

A. <u>The Business of the Respondent</u>

The complaint alleges, Respondent admits and I find that at all times material herein that Respondent has been a not-for-profit financial cooperative, engaged in the extension of

consumer credit and general banking business to its members at four branch facilities located in Muncie, Indiana, that during the past 12-months, the Respondent, in conducting its business operations described above, transferred funds in excess of $50,000, from its Muncie, Indiana facilities directly to financial institutions located outside the State of Indiana, that during the past 12 months, the Respondent, in conducting its business operations described above, derived gross revenues from investments and securities in excess of $1,000,000, and that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

C. The Appropriate Unit

The complaint alleges, Respondent admits and I find that at all times material herein the following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

On November 21, 2003, following an election won by the Union, it was certified as the exclusive collective bargaining representative of the Unit and at all times since that date, based upon Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

D. The Alleged Section 8(a)(5) Unilateral Implementation of the Non-Electioneering Rule and the Discharge of Diane Hartman Pursuant to the Rule

Facts

Respondent WGE is a non-profit financial cooperative (a credit union) established for the benefit of members to whom it provides financial services. Its bylaws state its purpose is "to promote thrift among its members by affording them an opportunity to accumulate their savings and to create for them a source of credit . . . ." Its mission statement is to "be the primary financial institution . . . by offering high quality, innovative services while maintaining financial strength . . . ." Its customers are called members and include employees from companies called Select Employee Groups ("SEGs") as well as many of Respondent's own employees. Respondent is controlled by a seven-person Board of Directors, each of whom is elected by the membership to a staggered, three year term. Julie Eskew is the

President and Chief Operating Officer (C.E.O.) of Respondent. She reports to the Board of Directors. Eskew has been CEO since January, 2003, and prior to that held several positions during her seventeen year employment with Respondent. In September, 2003, the Union initiated a campaign to represent the employees. An election was held on November 13, 2003, and the Union was elected to serve as the exclusive bargaining agent on behalf of the unit employees. Respondent opposed the election of the Union. Following the certification of the Union on November 21, 2003, the parties commenced bargaining for an initial labor agreement on January 13, 2004. The Union promoted three candidates for the upcoming Board of Directors election for three positions which were up for election which was scheduled in early April, whom it deemed would be favorable to the employees' interest. The candidates gathered signatures and successfully petitioned to be placed on the ballot.

Prior to this occasion there had been only one contested election for the Board of Directors. This occurred in early 2001, when Respondent's Vice President Pat Perry telephoned employee Cathy Creek and asked her about a non-employee credit union member Kathi Pickering as a potential candidate for a position on the Board of Directors. Creek told Perry she thought that Pickering would be a good candidate and do a good job. Perry asked Creek to contact Pickering and ask if she would be interested in this position. Creek agreed to do so but told Perry that Pickering would inquire as to what she would need to do as a member of the Board of Directors. Perry told Creek to have Pickering call her and that she would explain what the position would entail. Creek contacted Pickering and Pickering ran for the position and was elected. The exchange between Perry, Creek and Pickering took place during working time. Connie Lodde, former Business Development manager, who had been employed by the Respondent for 19 years, testified that in the 2001 Board of Directors contested election, which was the only other contested election, she was approached by Linda Gill, the Director of Lending, on work time and told that there would be two ladies running in the spots of two seats which were up for election and that "we were all asked to get on board and help the two ladies to get elected." Gill made it clear that she could not head up the campaign because of her position as vice president of lending. On reflection Lodde testified there were actually three ladies running for election in the 2001 Board of Director's election. I credit the testimony of Creek and Lodde as set out above which was unrebutted as neither Perry or Gill were called to testify.

During the 2004 campaign for the Board of Directors, CEO Eskew held a meeting of Respondent's leadership group which is composed of various department heads and asked each manager and department head to contact 100 credit union members to encourage them to vote for the three incumbent Board members who were up for election and who were being opposed by the Union sponsored candidates. Connie Lodde testified that some of the leadership group members questioned the professionalism and propriety of their becoming involved in the campaign and contacting other credit union members. Lodde asked Eskew what she should say and Eskew composed a script which she presented to them at a second meeting concerning this matter. At the hearing Eskew testified that on reflection she, herself, became concerned about the lack of professionalism and propriety that engaging in electioneering might entail.

On February 25, 2004, Eskew conducted an all-staff meeting, including both the hourly employees and management personnel. She testified that she had become concerned

as it was reported to her that employees Lisa Ambrosetti and Janice Ferrell who were self-supervised at the Kilgore branch were telling members to take literature in support of the candidacy of the three union sponsored candidates who were running in opposition to the three ladies who were incumbents on the Board. Additionally Eskew who had herself become concerned about the propriety of the management staff campaigning in the Board of Directors' election, testified she told the employees that they were not to campaign as employees of WGE and could not campaign on credit union time or use credit union facilities or property to do so. She followed this meeting up with an "e" mail to all employees setting this out.

Subsequently Eskew learned that unit employee Diane Hartman, a loan officer, had delivered literature and ballots in support of the Board of Directors' candidacy to the Muncie Eye Clinic, which was one of the SEG employers, for distribution in their break room and that Hartman had attached her WGE business card to the literature and ballots and left a note telling the employees to contact her at home if there were any questions. Eskew confronted Hartman about this on March 16, 2004, and discharged Hartman on March 19, 2004, for not following the instructions she had given to the employees at the February 25, 2004, all staff meeting and had confirmed in a follow up "e mail" to all employees.

Contentions of the Parties

In its pre-hearing brief General Counsel contends as follows: Respondent unilaterally implemented a new rule prohibiting employees from campaigning in their capacity as employees, for the Board of Directors. He argues that it is well settled that work rules that can be grounds for discipline are mandatory subjects of bargaining, and an employer may not make or change them without notifying a union and giving it an opportunity to bargain, citing *King Soopers, Inc.*, 340 NLRB No. 75, slip op at 1-2 n. 7 (2003) where a rule requiring employees to use scanners at work was held to be a mandatory subject of bargaining because it established a new predicate for discipline. For purposes of determining if bargaining is mandatory, work rules should not be severed from their ensuing penalties, and an employer must bargain over the substance of the rules as well as the penalty, citing *Peerless Publications*, 283 NLRB 334-35 (1987) where the Board held that rules and their penalties should not be artificially severed because the attachment of penalties is what transforms the rules from expressions of opinion into terms and conditions of employment. In the instant case the Union had been certified as collective bargaining representative of the unit employees when Respondent on February 25, 2004, unilaterally implemented the rule against electioneering, which vitally affects employees' terms and conditions of employment as a means of discipline. Thus the rule is a mandatory subject of bargaining unless it falls within an exception to the mandatory bargaining requirement.

General Counsel contends that Respondent cannot establish a viable "core purpose" defense. The Board in *Peerless, supra,* established a very narrow exception to the presumption that bargaining over work rules is mandatory. This exception covers rules that go to the "protection of the core purpose of the enterprise" and are narrowly tailored to meet that objective. Management has no duty to bargain over basic decisions concerning the enterprise, citing *American Electric Power Co.,* 302 NLRB 1021 (1991). These kinds of decisions directly relate to the basic direction, scope or nature of the enterprises. In Peerless

the Board found that protecting the "editorial integrity of a newspaper is "at the core of publishing control" and to preserve editorial integrity, a news publication would not necessarily be required to bargain before implementing a code of ethics designed to ensure responsible journalists and the integrity of the publication. General Counsel argues further that a rule based on general concerns such as the preservation of employer integrity is a goal of any enterprise and does not directly address any core purpose. The rule at issue in the instant case does not protect a "core purpose but purports to prohibit electioneering activity in order to "keep our reputation" as a "respected financial institution." Nor is Respondent's concern that Hartman's actions threatened Respondent's "competitiveness," a core purpose. All businesses have a legitimate interest in retaining respect, competitiveness and strong reputations. These interests apply no more to a credit union than to any other enterprises. Respondent may argue that "financial stability" is a core purpose of a credit union, an enterprise whose purpose is to "promote thrift among members," "accumulate their savings" and "create for them a source of credit", might have a greater interest in financial stability than other enterprises. Respondent's mission statement states it seeks to "maintain financial strength." However, it cannot demonstrate that the rule's subject matter was necessary to protect its core purposes of financial stability or promoting member's savings or providing sources of credit. The rule was not restricted to matters that would threaten the reliability or stability of Respondent's monetary product. Rather, the rule prohibits employees from discussing with other members, during work time, views on candidates for the Board of Directors. Campaign statements such as that a particular candidate will help the credit union to remain "competitive" (as were involved in this case) do not threaten financial stability. Regulation of such statements is not a "core purpose" under *Peerless, supra*.

General Counsel notes that Respondent may argue that Hartman's conduct was not protected by the Act, and that her discharge cannot therefore be a violation of the Act. Respondent argues Hartman's conduct is akin to unprotected picket line misconduct. However that kind of conduct is far distinguishable from Hartman's electioneering activity. Here only electioneering activity was prohibited, not violence, threats of violence, seizing an employer's plant "or other unlawful acts in order to force compliance with demands," *Clear Pine Moldings*, 268 NLRB 1044, 1046 (1984) enfd. mem. 765 F.2d 148 (9th Cir 1985), citing *Fanstell Metallurgical Corp v. NLRB*, 306 U.S. 240 (1939).

General Counsel notes that Respondent also asserts that it merely retained the status quo, that it had never permitted employees to campaign for Board of Director candidates and thus previously had in effect an unwritten "informal" rule. However General Counsel contends the evidence showed that in 2001 Respondent not only allowed but encouraged employees to campaign for Board of Director candidates, even on Respondent's time. Further assuming arguendo that Respondent had a prior rule prohibiting electioneering, it had never been enforced against an employee. Thus Respondent either had no prior rule prohibiting electioneering nor modified any purported "informal rule" by adding a disciplinary element. See *Scepter Ingot Castings*, 331 NLRB 1509, 1516 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002) where the Board found a Section 8(a)(5) violation where the employer, without bargaining with the union, formalized a rule by adding discipline to the rule, contrary to its past practice. General Counsel concludes that Respondent unilaterally implemented a rule prohibiting employees from electioneering in their capacity as employees, for the Board of Director's election. The newly created rule does not advance a core purpose of Respondent

and whether Hartman's conduct is protected is irrelevant. Thus Respondent thereby violated Section 8(a)(5) of the Act. The discharge of Diane Hartman pursuant to this unlawfully implemented rule was also a violation of Section 8(a)(5) of the Act and her discharge must be rescinded.

In his post hearing supplemental brief General Counsel makes the following points and arguments: As the certified bargaining representative of Respondent's employees, the Union has the right to receive notice and be given an opportunity to bargain over any new employee work rules. From the evidence adduced at the hearing it is clear that Respondent had no rule prior to February 2004, concerning employees electioneering for the Board of Directors. During the 2001 Board of Director's election cycle, employee Cathy Creek was asked by Vice-President Pat Perry to contact, while on work time, one of Respondent's members to seek her candidacy for the Board. Connie Lodde testified and President Julie Eskew confirmed that for the 2004 election each person on the leadership team was asked by Eskew (on Company time and while using Respondent's e-mail system) to solicit the support of 100 members for the incumbent Board candidates. Eskew went so far as to prepare and distribute a script during a leadership meeting to assist them with their solicitations according to the testimony of Lodde whom I credit. Eskew testified she could not recall distributing the script.

General Counsel notes that when Eskew discovered that Lisa Ambrosetti and Janice Ferrell were actively encouraging members to sign a petition to place competing candidates on the ballot for the 2004 Board election, no disciplinary action was taken against them, presumably because no rule against electioneering existed prior to February 25, 2004. Eskew confirmed that instructions concerning employee electioneering had not been given by her to employees prior to her meeting with Ambrosetti and Ferrell and that no written rule to that effect existed prior to February 25, and there is no evidence of the existence of an unwritten rule prior to this date. It is also clear that no bargaining occurred between Respondent and the Union concerning the implementation of a rule prohibiting employee electioneering. General Counsel argues that Respondent has not established a "core purpose" defense as there was no evidence at the hearing to prove how its unilateral implementation of a rule against employee electioneering is related to any alleged core purpose. As discussed in *Peerless, supra,* any alleged such unilaterally implemented rule must be "narrowly tailored" to meet the objective of protecting the Respondent's core purpose. This rule is anything but narrowly tailored. Eskew agreed there was no way for her to enumerate all the different ways in which Respondent's unilaterally implemented prohibition against employee electioneering could be violated. As recently as February, 2005, she indicated how broad this rule was to employee Cathy Creek through an e-mail where Eskew stated the rule as follows:

> There can be nothing associating you with the credit union because you are not representing the credit union. That would include no parking in the lots, passing out literature that insinuates it's endorsed by WGE employees, wearing WGE shirts, using credit union information, materials or supplies – basically anything that ties you to the credit union. <u>This list is a sample and can't possibly include all the scenarios</u> so if there is something specific you are unsure of, the best practice would be to ask me. (emphasis added)

General Counsel notes that Respondent continues to argue that Diane Hartman was engaged in unprotected activity and therefore it had no obligation to bargain with the Union over the employee electioneering rule under which Hartman was discharged. However the nature of Hartman's activity is irrelevant to these Section 8(a)(5) proceedings. The best analogy to demonstrate Respondent's fallacious reasoning is drug testing. The Board has long held that the implementation of a drug testing policy is a mandatory subject of bargaining, citing *Johnson-Batemann Co.*, 295 NLRB 180, 182-84 (1989). This is true despite the fact that the underlying employee conduct is not only unprotected, but most often illegal. Thus regardless of whether Hartman's conduct was protected, as the duly designated bargaining representative, the Union had a right to notice of the new rule and an opportunity to bargain with Respondent since the rule certainly impacts employees' terms and conditions of employment. No such notice was given here.

General Counsel states that Respondent may attempt to argue for the first time that the Union has waived any right to bargain over its newly implemented employee electioneering policy. There is no evidence that the Union clearly and unmistakably waived its right to bargain over the new rule. The rule did not exist prior to February, 2004, and was not put into writing until February 25, well after the Union's certification as bargaining representative. There is no evidence that notice of the proposed rule was given to the Union prior to its implementation. Respondent's actions here are a "fait accompli" which the Union cannot be expected to request bargaining over after the fact, citing *Scepter Ingot Castings,* , 331 NLRB 1509, 1515 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002). The newly created rule does not advance a core purpose and whether Hartman's conduct is protected is irrelevant. Hartman's discharge pursuant to the unlawfully implemented rule is a Section 8(a)(5) violation, as is the implementation of the rule.

Charging Party's Contentions

Charging Party in its Pretrial Memorandum makes similar arguments to those raised by Counsel for General Counsel in his submitted briefs, that WGE anti-electioneering policy neither protects the "core purposes" of the Credit Union nor meets the particularity requirements set forth in *Peerless*. The "policy" has never been reduced to writing. WGE never had a policy against employee participation in campaigns for candidates for the Board of Directors until after the Union was certified. The policy was vague, ambiguous and overbroad and involves matters that do not address the core purposes of the credit union. Accordingly WGE was obligated to notify and bargain with the Union before implementing the policy. Thus it violated its bargaining obligation and terminated Diane Hartman pursuant to the unlawfully implemented policy. The appropriate remedy is the reinstatement of Hartman with full backpay, seniority and benefits, rescission of the policy, and an order to bargain with the Union.

Respondent's Contentions

In its Pre-Hearing brief Respondent contends it had no duty to bargain over the rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of the Credit Union. The historic practice at the credit union has been that

employees are free to campaign as individuals for candidates for the board of directors but such campaigning is not to be conducted on work time or in any representative capacity as employees of WGE. The Board of Directors Elections were scheduled to take place in the first week of April 2004. President and CEO Julie Eskew received reports that some employees of WGE had been engaged in Board of Directors campaign activity with members during working time at the credit union. Eskew therefore made a point at a staff meeting on February 25, 2004, to reinforce the unwritten policy of WGE regarding campaign activity by WGE employees. As shown by notes of the meeting, employees were specifically told by Eskew "Keep in mind that we need to keep this election separate from our duties at the credit union. While you are on working hours, we should not influence any members' decision how to vote. We are a respected financial institution and we want to keep our reputation as such."

Respondent notes that on about March 8, 2004, a representative of one of WGE's SEGs, the Muncie Eye Center, reported they had received campaign material from Diane Hartman. Eskew was provided with a copy of the campaign brochure that accompanied the hand written note and business card of Hartman. Hartman violated the instruction not to campaign for board members as an employee of WGE. Hartman's handwritten note states: "We, hourly employees, know that we need a change at the credit union. The three gentlemen on this handbill will do a great job as new directors. If anyone has any questions, they may call me." She then aggravated the offense by attaching her WGE business card. The handbill states in part:

> The following nominees desire to have a seat on the board of directors of WGE Federal Credit Union: We, the hourly employees of WGE, support these men. We believe that they will give our board the direction needed to remain competitive for the future

Hartman admitted to Eskew that she had used credit union information regarding the identity and address of Select Employee Groups and had sent similar packages of campaign materials to a number of other SEGs for distribution to their employees. Hartman would not confirm or deny that she had used her business card in these other mailings nor would she specify the other SEGs to whom she had sent campaign material. Eskew initially suspended and then terminated Hartman for her admitted campaign activity.

Respondent contends that the activity in campaigning to influence the Board of Director's election was unprotected and thus Hartman was properly discharged, citing *Lutheran Social Service of Minnesota*, 250 NLRB No. 35, (1980) for the principle that the Act does not protect an employee's "efforts to affect the ultimate direction and managerial policies" of an employer's business quoted by *Riverbay Corporation d/b/a Co-op City*, 341NLRB No. 34 (2004). It also cites Retail Clerks Union, Local 770, 208 NLRB No. 356, 357 (1974).

WGE also contends that the enforcement of the rule and the discharge of Hartman were lawful under the standards enunciated in the Board's discussion in *Peerless, supra,* where the employer had unilaterally implemented a code of ethics directed at protecting the journalistic integrity of the Company. On remand from the D.C. Circuit, the Board acknowledged that an employer can lawfully refuse to bargain over a rule that goes to the

protection of the "core purposes of the enterprises." While the Board accepted the "core purpose" principle, it stated that the employer must also establish that the rule on its face is "(1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." Utilizing this standard the Board found that the rule in *Peerless, supra*, was overly broad and, therefore, unenforceable without being bargained.

Respondent argues that by contrast, the rule announced at WGE and enforced with respect to Diane Hartman was quite narrow and directly tied to the "core purpose" that was of concern to the enterprise. The election for certain seats on the Board of Directors was pending. Eskew had received reports that certain tellers had been soliciting support for certain board candidates while serving certain credit union customers. This report triggered the agenda item at the February 25, 2004 staff meeting. As reflected in the notes previously provided, Eskew informed employees that "we need to keep this election separate from our duties at the credit union. While you are on working hours, we should not influence any member's decision on how to vote. We are a respected financial institution and we want to keep our reputation as such."

Respondent argues further that Hartman was terminated for conduct that occurred after this staff meeting in direct violation of the instructions that had been given her. She solicited support for Board candidates with a flyer and at least on one proven occasion, a WGE business card. The flyer states in relevant part "We, the hourly employees of WGE, support these men. We believe they will give our board the direction needed to remain competitive for our future." The clear inference to be derived from this message was that the competitiveness of WGE was at risk. The record established that employees have never been allowed to campaign for or against candidates for the WGE Board of Directors, either during work time or holding themselves out in any way as representatives of WGE. The weight of authority establishes that this conduct is not protected by the Act. As such it is at best a permissive subject of bargaining regarding which the employer is free to act unilaterally. *Allied Chem & Alkali Workers Local 1 vs. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 78 LRRM 2974 (1971).

In its post-hearing brief Respondent again argues that Hartman's activities were not protected by the Act and that as such, she could have been terminated for her electioneering activities without prior notice or recourse under the Act. Respondent notes that the General Counsel has declined to prosecute this case under Section 8(a)(3). WGE argues that the "unique instruction" against electioneering in this case does not fall within the scope of mandatory subjects for bargaining and thus could be given and enforced unilaterally without prior notice and bargaining.

Respondent asserts that while General Counsel seeks to narrow the application of *Peerless, supra,* to the field of newspapers, a better analysis is to recognize that the instant case involves an analogous effort by WGE to protect "one" of the "core purposes" of its business, that is "integrity of governance" Respondent cites *California Newspaper Partnership,* 343 NLRB No. 69 (2004) for the principle that even under Section 8(a)(5) standards, an employer has the right to instruct employees not to engage in conduct that

creates the appearance of a conflict of interest. Respondent argues that if WGE could have terminated Hartman for campaigning in the Board election without a rule, "how does the 'heads up' warning on February 25 change the analysis?"

Analysis

I find that the General Counsel has established a prima facie case of violations of Section 8(a)(5) and (1) of the Act by the unilateral implementation of the non-electioneering rule and the discharge of Diane Hartman pursuant to the rule. I am persuaded by the position of the General Counsel and Charging Party, as set out above, that the Respondent had an obligation under the Act to notify the Union as the exclusive collective bargaining representative of the unit employees and to bargain with the Union prior to the unilateral implementation of the rule. I find that the non-electioneering rule imposed unilaterally by Respondent was a mandatory subject of bargaining and that Respondent clearly bypassed the Union in acting unilaterally. I find as contended by the General Counsel and Charging Party in their arguments as set out above that the Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral implementation of the non-electioneering rule and by the discharge of Diane Hartman pursuant to this rule.

E. The Alleged Section 8(a)(1) Threat

Facts

On October 20, 2003, Marketing Director Dana Baker visited the Kilgore branch office and spoke to the two employees (Lisa Ambrosetti and Janice Ferrell) who were the only employees assigned to this office and who were self-supervised. According to Ambrosetti and Ferrell, Baker told the two employees that if the Union won the election, changes could or would be made, as a manager would be assigned to their office and one employee "would" or "could" lose their job. Baker testified at the hearing that she only told these employees that she did not know what would happen in response to their inquiries as to what would happen if the Union won the election. Ambrosetti and Ferrell also both testified that Baker had never previously stopped in to see them to chat with them. I credit Ambrosetti's and Ferrell's version of this conversation and find that this was a threat of adverse changes in their terms and conditions of employment and the loss of their job. I do not find it determinative whether Baker said that one employee "could" or "would" lose their job as the use of either word constituted a threat. I thus find that by this threat Respondent violated Section 8(a)(1) of the Act.

General Counsel notes that Respondent may argue that no violation can be found because Baker's conduct occurred outside the Section 10(b) period. The original charge in this matter was filed on March 23, 2004, starting the six-month period at September 23, 2003. Although the initial charge did not allege this conduct by Baker as unlawful, the first amended charge did. The filing of a timely original charge tolls the 10(b) period and subsequent amendments are permitted, even outside the 10(b) period, so long as the new allegations are "closely related" to the original allegations, citing *Ross Stores, Inc.*, 329 NLRB 573 (1999), enf., den. In part, 235 F.3d 669 (D.C. Cir. 2001); *Nickles Bakery*, 296 NLRB 927 (1987); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

General Counsel further notes that the original charge alleged Hartman's Section 8(a)(3) discharge for engaging in union activity and that the amendment alleges the Section 8(a)(1) threats occurred during the same organizing campaign and that both allegations share a common legal theory which is Respondent's union animus. The fact that different sections of the Act are involved, is not dispositve. Both allegations also share similar factual circumstances as they arose out of the same organizing campaign and Respondent's efforts to resist the Union.

General Counsel in his post-hearing brief contends that Baker is a Section 2(13) agent as "under all the circumstances, the employees would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management.," citing *Great American Products*, 312 NLRB 962, 963 (1993) (quoting *Waterbed World*, 286 NLRB 425 (1987). I find Baker was a Section 2(13) agent of Respondent when she issued the threat to Ambrosetti and Ferrell.

Respondent contends that the allegations regarding Dana Baker are untimely as the original charge filed on March 23, 2004, does not satisfy the tolling deadline because it alleged only the discharge of Diane Hartman and does not imply any allegations of any unlawful threats of Dana Baker. Respondent contends there is no similarity between the alleged threats by Baker on October 30, 2003, and Hartman's discharge on March 18, 2004, so there can be no "relating back" for purposes of tolling the Section 10(b) deadline and that the amended charge is thus untimely and must be dismissed, citing *Speed Queen*, 192 NLRB 975, (1971); *Sunnen Products, Inc.*, 189 NLRB 826 (1971). In its post-hearing brief Respondent contends that in response to questions by Ferrell and Ambrosetti, Dana Baker told them no one knew what would happen, she told them "it was all up to the bargaining."

Analysis

I find that Baker unlawfully threatened Ferrell and Ambrosetti with adverse consequences and the loss of a job if the Union won the election. I credit Ferrell's and Ambrosetti's testimony over that of Baker. I also find, for the reasons set out in General Counsel's brief that Baker was acting as Section 2(13) agent of Respondent. I find that the allegations of the Section 8(a)(1) threat and the Section 8(a)(5) allegations relate back to the original charge and that the charge is timely. I thus find that Respondent violated Section 8(a)(1) of the Act by the threat made by Baker.

Conclusions of Law

1. Respondent is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by threatening its employees with adverse changes in their terms and conditions of employment and with the loss of the job of one employee.

5. The Respondent violated Section 8(a) (5) and (1) of the Act by the unilateral implementation and maintenance of a rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of Respondent.

6. Respondent violated Section 8(a)(5) and (1) of the Act by discharging its employee Diane Hartman pursuant to the aforesaid rule.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in violations of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative actions to effectuate the purposes and policies of the Act and post the appropriate notices.

It is recommended that Respondent rescind the unlawful rule and offer immediate reinstatement to Diane Hartman to her former position or to a substantially equivalent position if her former position no longer exists. She shall be made whole for all loss of backpay and benefits sustained by her as a result of the unlawful discharge. Respondent shall also remove from its files all references to the unlawful discharge and advise her in writing that this has been done and that the unlawful discipline will not be used against her in any manner.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 USC Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[1]

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1 If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, WGE Federal Credit Union, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unlawfully threatening its employees with adverse changes in their terms and conditions of their employment and with loss of their jobs.

(b) Unilaterally implementing and maintaining a rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of Respondent.

(c) Discharging its employees pursuant to the aforesaid rule.

(d) Violating the Act in any like or related manner.

2. Take the following affirmative actions designed to effectuate the policies of the Act.

(a) Rescind the unlawful rule against electioneering by employees while acting in their capacity as employees of Respondent.

(b) Offer Diane Hartman immediate and full reinstatement to her former position without prejudice to her seniority and benefits or other rights and privileges previously enjoyed.

(c) Make Diane Hartman whole, with interest, for any loss of earnings and benefits, she may have suffered as a result of her unlawful discharge in the manner set forth in the remedy section of this decision, with interest.

(d) Preserve and, within 14 days of a request, provide at the office designated by the National Labor Relations Board or its agents, one copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(e) Post at its facilities in Muncie, Indiana, copies of the notice "Appendix"[2] consistent with the terms of this Order immediately upon receipt thereof, and

2 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

maintain them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to WGE Federal Credit Union employees are customarily posted. Reasonable steps shall be taken by Respondent WGE Federal Credit Union to ensure that said notices are not altered, defaced, or covered by any material.

(f) Within 14 days from the date of this Order remove from its files any reference to the unlawful actions taken against the aforesaid employee and within 3 days inform her in writing of this and that the unlawful actions will not be used against her in any way.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C.

_____

Lawrence W. Cullen
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with adverse changes in your terms and conditions of employment or with the loss of your jobs for engaging in union activities.

WE WILL NOT unilaterally implement and maintain a rule prohibiting our employees from engaging in electioneering activities while acting in their capacity as our employees.

WE WILL NOT discharge our employees pursuant to the aforesaid rule.

The following of our employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

Local 1, Office And Professional Employees International Union, AFL-CIO is the exclusive collective bargaining representative of the aforesaid employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

WE WILL rescind the unlawful rule and will advise the Union and the unit employees of this and make whole any employees who may have suffered a loss of earnings or benefits as a result of its issuance or application.

WE WILL offer Diane Hartman immediate and full reinstatement to her former position without prejudice to her seniority and benefits or other rights and privileges previously enjoyed.

WE WILL make Diane Hartman whole for any loss of earnings and other benefits, including seniority, suffered by Respondent's discharge of her in the manner set forth in the remedy section of this decision, with interest.

WGE FEDERAL CREDIT UNION
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website**: www.nlrb.gov.**

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7413, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (317) 226-7413